U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 03 March 2004

BALCA Case No.: 2002-INA-255
ETA Case No.: P2001-MA-01315462

In the Matter of:

RIVERSIDE LANDSCAPING,
Employer,

on behalf of

ALAN ACORRONI,
Alien.

Appearances: John K. Dvorak, Esquire
Boston, Massachusetts
For Employer and the Alien

Certifying Officer: Raimundo A. Lopez
Boston, Massachusetts

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from Employer's request for review of the Certifying Officer's ("CO") denial of alien labor certification for the position of Landscape Gardener.[1]

[1]Permanent alien labor certification is governed by § 212(a)(5)(A)of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20. We base our decision on the record upon which the CO denied certification and Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On March 26, 2001, Riverside Landscaping ("Employer") filed an application on behalf of Alan Acorroni ("the Alien") for the position of Landscape Gardener. (AF 43). Two years of experience in the job offered were required. The job duties included landscaping and maintenance of gardens, pool areas and walks, and maintaining equipment.

The CO issued a Notice of Findings ("NOF") on April 1, 2002. (AF 26-27). Citing 20 C.F.R. § 656.3, the CO stated that "employment" is permanent full-time work by an employee for an employer other than oneself. While the ETA 750A listed the position as a thirty-five hour per week position, the duties described in Item 13 did not appear to the CO to constitute year-round employment in the area of intended employment, in particular during the autumn and winter months in New England. Employer was advised that rebuttal needed to provide documentation that the position was a year-round and full-time position, including payroll records showing that landscape gardeners were paid on a year-round basis, as well as a list of the duties done during the winter months which constituted thirty-five hours per week of employment. (AF 27).

By letter dated May 30, 2002, counsel for Employer submitted rebuttal which included a May 15, 2002 letter from Employer's president, and Employer's quarterly wage reports for the period from January 1 to March 31, 2002. (AF 19-25) Therein, Employer stated that it performed all types of tree work throughout the year, and that it pruned and removed trees during the winter months.[2] Employer contended that it did fall clean-ups in December, and built stone walls and installed pathways during the winter months, as well as doing other activities such as going to nurseries to tag trees and ordering stock for the upcoming season. Employer also stated that it did plowing and

[2] Although in the ETA 750, Employer was listed as Riverside Landscaping, the letterhead of the rebuttal letter listed the name of Employer as "Riverside Tree & Landscape." (AF 21, 45).

repair work and removed holiday lighting, and that its employees were kept busy all year round. (AF 21-22). Employer also produced a quarterly wage report showing total wages paid to twenty-seven employees during the quarter ending March 31, 2002. (AF 25).

The CO issued a Final Determination ("FD") on June 18, 2002, finding that Employer had failed to satisfactorily rebut the NOF. (AF 17-18). Specifically, the CO found that Employer had failed to establish full-time year-round employment and it had failed to provide payroll records that established that employees were paid year-round. The quarterly wage report established that there was a diversified pay scale between employees, raising the issue of whether other landscape gardeners were paid on a year-round basis. Finding that Employer had failed to submit all the documentation requested in the NOF to establish that the position did indeed constitute full-time, year-round employment, the CO denied the application. (AF 18).

On July 18, 2002, Employer requested review of the denial of labor certification and the matter was docketed in this Office on August 13, 2002. (AF 1-16).

DISCUSSION

In its Request for Review, Employer reiterated its arguments, attached documents from another labor certification application involving Employer, and provided new evidence regarding the Alien's earnings statements. (AF 1-16). With regard to the other labor certification case, each application involves it own set of facts and issues and therefore, "submission of a prior approved application does not set any precedent to which the CO [or the Board] is bound." *Paralegal Priorities*, 1994-INA-117 (Feb. 1, 1995). Furthermore, that evidence, along with the Alien's earnings statements, were not before the CO. With the submission of the earnings statements, Employer is now, belatedly, attempting to submit the documentation requested by the CO in his NOF. This Board will not consider the material submitted with the request for review, as our review is to be based on the record upon which the denial of labor certification was made, the

request for review, and any statement of position or legal briefs. 20 C.F.R. §§ 656.27(c), 656.26(b)(4). Evidence first submitted with the request for review will not be considered by the Board. *Capriccio's Restaurant*, 1990-INA-480 (Jan. 7, 1992).

The employer bears the burden of proving that a position is permanent and full-time. If the employer's evidence does not show that a position is permanent and full-time, certification may be denied. *Gerata Systems America, Inc.*, 1988-INA-344 (Dec. 16, 1988). In the instant case, Employer was fully advised of the specific documentation needed to rebut the NOF, yet failed to produce this documentation.

If a CO reasonably requests specific information to aid in the determination of whether a position is permanent and full-time, the employer must provide it. *Collectors International, Ltd.*, 1989-INA-133 (Dec. 14, 1989). Employer's failure to submit the documentation reasonably requested by the CO warranted a denial of labor certification. *Rouber International*, 1991-INA-44 (Mar. 31, 1994). The documentation requested by the CO herein was reasonably requested and relevant to the determination of whether the position at issue constituted full-time employment.

In view of the foregoing, we find that labor certification was properly denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.